NATIONAL CHEMSEARCH CORPN. (S.E.A.) PTE. LTD. & ANOR. v. HOTEL AMBASSADOR (MALAYSIA) SDN. BHD.

[F.C. (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.) May 21, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 7 of 1974]

Tort — Negligence — Supply of chemical not fit for purpose required — Burden of proof — Admission by agent — Privileged document — No presumption from non-production — Evidence Act, s. 114(g).

The respondents had obtained judgment against the appellants for negligence in supplying a chemical which was not fit for the purpose for which it was required. The appellants appealed on the grounds (a) that the learned trial judge had misdirected himself in holding that the chemical caused the corrosion of the air-conditioning plant; (b) that he had misdirected himself in holding that the burden of proof was on the appellants; (c) that he had misdirected himself (i) in drawing an adverse inference from what one Mr. Kirkby, an agent of the appellants, was alleged to have said and (ii) in failing to draw an adverse inference from the failure of the respondents to produce a report from one Mr. Kellaway which they had in their possession.

Held: (1) on the facts the learned judge was correct in holding that the chemical had caused the corrosion and perforations which led to the breakdown of the air-conditioning plant;

(2) the learned judge was correct in holding that as the respondents had produced evidence which entitled them to rely on the principle of *res ipsa loquitur* the burden of proof shifted to the appellants to show that the res had been silenced or in any way became muted;

(3) the statement by the agent was admissible as an admission against his principal, the appellants;

(4) no adverse inference could be drawn from the non-production of the report as it was called into existence for the purpose of litigation and therefore privileged.

Case referred to:-

(1) *Lloyde* v. *West Midlands Gas Board* [1971] 2 All E.R. 1240, 1246.

FEDERAL COURT.

R. R. Chelliah (*C. Arul* with him) for the appellants.

Lim Kean Siew for the respondents.

Wan Suleiman F.J.: The first appellant claims to be the agents and distributors in Malaysia and Singapore of chemical products manufactured by the National Chemsearch Corporation and not the manufacturer of the chemical product, the National Chemsearch Brex Concentrate, and the second appellant is the agent or servant of the first defendant.

On September 11, 1970 a drum containing 15 American gallons (15 American gallons equal to 12.5 Imperial gallons) of that chemical (henceforth referred to as Brex) was sold and delivered to the respondents for use in their air-conditioning plant. On September 22, 1970 at about 4.30 p.m. four to five gallons of Brex was poured into the air-conditioning plant by second appellant. On September 23, 1970 the rest oft he Brex was poured in. The following day at about 11.00 a.m. the air-conditioning plant failed.

The respondents subsequently brought an action against the applicants alleging that Brex had caused corrosion of the copper tubes and that the corrosion so caused was the cause of the breakdowns of the plant. They alleged that the second appellant was negligent and further alleged that the chemical, Brex was not fit for the purpose for which it was required. Of the two particulars in paragraph 6 of the Statement of Claim the relevant one, it was submitted on behalf of the appellants, is the second *i.e.* permitting the said chemical to remain in the cooling system of the said plant for too long a time which resulted in corrosion and damage to the said plant.

The appellants denied all these allegations, in their separate defences.

Evidence which was led showed:—

(1) The condenser tubes in the air-conditioning plant were made of copper;

(2) that there was perforation of the copper tubes;

(3) through this perforation water escaped into the compressor;

(4) that was the cause of failure of the air-conditioner.

The learned trial judge held:

(i) that Brex was fit for the purpose for which it was required subject to certain precautions, but

(ii) that second appellant and his colleagues were negligent in the use of the chemical, and that the hydrochloric acid caused the perforation.

Learned counsel for the appellants confined his submission to three main grounds which are as follows:—

(1) that the learned trial judge had misdirected himself in holding that Brex caused the corrosion;

(2) that he had misdirected himself in holding that the burden of proof was on the appellants; and

(3) (i) that he had misdirected himself in drawing an adverse inference from what one Mr. Kirby is alleged to have said; and

(ii) in failing to draw an adverse inference from failure of respondents to produce a report from one Mr. Kellaway, which they had in their possession.

As far as the constituents of Brex is concerned it is admitted (see page 324, paragraph 2 of the Statement of Agreed Facts) that it contained 18% Hydrogen Chloride, 0.6% Organic Inhibitor and 81.4% Water. The appellants contend that the purpose of this inhibitor is to prevent the hydrochloric acid (hydrogen chloride) from attacking the metal.

In this connection attention was drawn to the evidence of Mr. Lim Chin Kuan, the plaintiffs' expert witness who was alleged to have said in respect of this inhibitor — "I won't know about the action of this inhibitor, but it could form a protective film on metal surface, including copper." (see page 52D). However, I think the word "including" should read "excluding" in view of what the same witness had said a short while earlier to this effect, "Brex Concentrate is formulated to remove scales from iron surfaces and that is why I say it would not prevent corrosion on copper."

Learned counsel also referred to the evidence of appellant's expert witness, Dr. Rintoul's evidence (DW5) at pages 202 and 209 of the record, but what DW5 said at page 202 seems to me to confirm that the inhibitor protects iron by forming a film on the

surface by magnetic force but that no such film will form in the case of copper (copper oxide). Thus there would only be surface wetting. He did not say whether such surface wetting would be protective to the copper surface so wetted. What he said on page 209 is equally inconclusive. The words used were "Inhibitor stops an action. In Brex Con. it is supposed to stop or hinder corrosion." This appears to be a general statement of the performance of this inhibitor, with no specific reference to its effect on copper.

In this case it was submitted on behalf of the appellants that presence of the inhibitor is important and that hydrochloric acid and a solution of hydrochloric acid plus an inhibitor are two different things. Hydrochloric acid will attack metal and cause corrosion but a solution of the former to which an inhibitor has been added will not do so. Reference was then made to the brochure at page 336 which contains directions for use of Brex. Under the heading "Condenser Systems", this brochure recommends that Brex is to be added to an air-conditioning system every two hourly until the water system reached 1 pH and so remain for two hours (the lower the pH reading the more the acid — 7 pH is supposed to be neutral, and 7 to 14 pH alkali).

The appellants contend that according to the evidence the pH reading never came below 1.3 or 1.2.

Only 5 gallons of Brex was used in 1050 gallons of water the first time, which was a weaker solution than that recommended in paragraph 3 of the brochure at page 336, not strong enough to do any harm.

The next day the remaining 10 gallons were poured in. There should have been 25 gallons of Brex to do the job according to calculations.

In his judgment the learned trial judge found (at page 244), on the evidence that (1) at no time did Don Wee ever check the pH of the water, (2) that in direct flouting of the directions, Brex was added to the system's *entire* capacity of recirculating water and (3) Brex was left in for considerably more than the 2 hours recommended, in fact for 42½ hours. It was submitted that findings 2 and 3 cannot stand.

Kirby was present at the meeting at the Hotel, representing Scott and English (S.E.A.) Sdn. Bhd., the managing agents for the first appellant, who in turn were agents and distributors for the manufacturers of Brex. There is undoubtedly no evidence on record as to what position he held in Scott and English, what qualifications he had or if he was a chemist and knew anything about Brex. By the time of the hearing he had already left Malaysia.

In the course of the hearing 3 witnesses called by the respondents said that they had heard a conversation between Kirby and Kellaway (representative of I.A.C., air-conditioner manufacturers of respondents' air-conditioning plant). Kellaway was not called by the respondents. Kirby was heard to say to Kellaway that Brex should have remained in circulation for only 2 hours. These witnesses were Vincent Goh — PW4 (page 73), Jeffrey Goh — PW8 (page 92) and Ng Khoh Weng — PW9 the Manager (pages 97/98).

The appellants did not call Kirby, we were told, firstly because his evidence is not relevant to their case and secondly because he had left the country. The trial judge accepted as a fact that Kirby made a statement and gave some importance to the statement on the basis that he was in the position of vendor to a party in the suit.

Against this background, I propose to examine the three grounds of appeal.

Firstly did Brex cause the corrosion?

It was submitted on behalf of the appellants that the learned trial judge had held that Brex or the Hydrochloric acid in it had done so, and that in coming to this conclusion he had to rely entirely on the evidence of two expert witnesses, Lim Chin Kuan (PW2) and Dr. Rintoul (PW5), by an analysis of their opinions.

The trial judge was criticised for accepting the opinion of PW2 without sufficiently scrutinising the basis of his opinion and evidence, and because he gave too much weight to certain alleged concessions made by Rintoul. It was argued that the concessions allegedly made did not affect the weight of his evidence, and also did not in any way affect the opinion which he had expressed *i.e.* that Brex could *not* have caused the corrosion, and that had the trial judge subjected the evidence of these rival experts to closer scrutiny he would have found Lim's (PW2's) evidence open to grave doubt.

We were told that one of the items of evidence damaging to PW2's evidence is the result of the analysis by him at page 296, (also page 323), of water taken from the cooling coils of the air-conditioning plant received from the Ambassador Hotel on September 25, 1970. The appellants contend that according to Rintoul, hydrochloric acid would first attack scales, then rust and dissolve them before attacking metal (see page 185B to D, and D to E5).

It is indeed correct that PW2 admitted (at page 49) that there was insufficient hydrochloric acid in the water to dissolve all the iron rust in it. From this Mr. Chelliah argues that Brex could not therefore have caused perforations in the copper tubing.

This conclusion is based solely on Rintoul's opinion of how Brex would work. Nowhere is it more clearly expressed than at page 195 where he said "I would expect the acid to attack the zinc first, then the iron and copper thirdly, after all the rubbish, like rust and scales had been treated."

This conclusion would only be correct if the court below had accepted Rintoul's evidence of the order of attack, because PW2 simply said that water at 3.7 pH would be fairly aggressive towards both iron and copper (page 44).

Again at page 43 PW2 said "Normally this concentration of acid would have very little effect on pure copper-tubing, but if there is some dissolved oxygen present and there is a strong flow of this acid solution on the surfaces of the tubes, then there would be quite some action. The copper would dissolve, the tubing will thin out and eventually there would be perforation."

In his report P3 he again said (at page 50) "I had stated that corrosion of the copper tubes and other copper components had taken place because of the presence of the products of corrosion, i.e. the large proportion of copper, zinc and iron. I say copper corrosion because of the presence of a large amount of copper in the water. The copper could not come from the scale as there is no copper in the sand and clay or hydrated alumina. It could come from the cupreous oxide on the tube." (See also page 55 E1/F4 — re: iron rust and corrosion).

It is indeed correct that the pH value of the water had at no time been 1. PW2 said the combined effect of 5 and then 10 gallons of Brex being poured into the 1050 gallons of water, with a gap of 24 hours, would give a pH value of about 1.2.

But he did not consider, as Mr. Chelliah submitted it was, that the Brex used was a weak solution. At page 55, he said that a scale (ref. I think to calcium carbonate scales) $\frac{1}{2}$" thick would dissolve in a 1.2 pH acidity in 1 hour if oxygen and water were turbulent. After that the copper tubing would be subject to the direct corrosive effect of the acid.

Appellants' counsel also contend that the high sodium (and potassium) content of the water analysed — Rintoul at page 182 said that the concentration was ten times that normally present — indicated that the maintenance of the air-conditioner had been sadly neglected. He said that prior to the addition of Brex, PW2's own analysis showed an aqueous solution with many salts already present in the cooling tube, as was dissolved oxygen, and these by themselves were corrosive to copper.

This, it was submitted, should throw doubt on the truthfulness of Vincent Goh PW4 who claimed that all the water in the air-conditioning system was completely changed every month. The electrician PW5 thought that the water was changed every 3 or 4 months, though, as is to be expected, he did not oversee Astoria's (PW's firm) servicing of the air-conditioning plant.

Respondents' expert PW2 himself conceded that if the water tank had been flushed and filled with fresh water one month before, he would not expect to find so much zinc, copper, iron and chlorides. The learned trial judge (at page 230) gives the impression that he is inclined to believe Vincent Goh, though he did not say so in so many words.

Whilst it does not follow, from such conflicting evidence, that the air-conditioning system had been properly maintained during the 6 or 7 years it had been installed, it would appear to be probable that Vincent Goh had somewhat exaggerated his diligence so that some corrosion had in fact taken place as a result of his laxity.

It was also agreed that since PW2 had said that scales would not normally form on copper tubes (page 48 A2), the presence of scales in the tubes must have been brought about by the concentration of various metals (salts) in the water arising from poor maintenance by Vincent Goh. Whether this is the conclusion to draw I am unable to say with conviction. PW2 did explain (at page 109) that scales occur where the flow is lessened.

Further evidence that damage to copper tubing had occurred before Brex was poured in could also, appellants argue, be found in the fact that cuprous oxide (copper rust) had been found by PW2 in the tube (photograph on page 302) on one side of the two rows of pits. Otherwise, the reasoning goes, Brex would have dissolved the cuprous oxide. Yet in the paragraph immediately preceding, Lim (PW2) had in effect said that these pits was "the result of impingement attack by high velocity water associated with dissolved oxygen" and added that that "form of corrosion is known to increase with the chlorine content and with depression of the pH value", or in other words, with the addition of Brex.

The pits were not examined by PW2. Rintoul, examining the pits (in D-6) under a low powered microscope observed that they were covered, as was the rest of the metal, with a film of copper oxide. He added that if Brex had made these holes, he would have expected a bright shining surface. It seems to me that if he is correct, the inside of the tubes, which had undoubtedly been exposed to Brex should also present a bright shining surface. Perhaps the fact that he received D-6 two years after the event had something to do with the film of cuprous oxide he found — which as a matter of common knowledge also forms when copper is exposed to air for a long period.

The most important single constituent of Brex which should be subject to close scrutiny is the inhibitor. The formula of the inhibitor is unknown, the manufacturers apparently finding it desirable to keep it a trade secret. Its effectiveness as an inhibitor must therefore be somewhat speculative. All we know is that it is called rosamine Ethylene oxide concentrate.

At page 63 PW2 said, "I find it suitable inhibitor for iron surfaces but *not* for copper. The reference states that such amine-type inhibitors are deleterious to copper, since they form water-soluble copper complexes *i.e.* they corrode the copper." In connection with iron surfaces, he had earlier said that an inhibitor works by slowing down the chemical action on iron surfaces by stabilising the ferrous oxide film on the iron surfaces and preventing the acid from getting at the iron.

Though Rintoul concedes that most amines but not all amines are deleterious to copper, he drew attention to the word "condensate", and said that the condensate may or may not contain amine in its final form. Contradicting himself he admitted at pages 201/202 that "primary amines" will be corrosive of copper, and accepts the manufacturer's description of rosamine to be of the primary type.

What in my view should remove any lingering doubt that the inhibitor does not work on copper is the manufacturer's leaflet — Exhibit D-13A (inserted in place of D-13, and marked P.336). To cite one portion thereof it "strips corrosion accumulations, mineral deposits and algae growth from iron and steel parts of entire system prior to using a preventive water treatment chemical." I cannot imagine the

manufacturers of a commercial product omitting to include copper systems as well and thereby restricting their market, unless they are well aware of the disasterous effect their product would have on copper, or at least have grave doubts about its suitability for use with copper equipment.

Was the learned trial judge correct in remarking about Rintoul's findings in his Grounds of Judgment (at page 256) "Save for one experiment in 1970 with Brex to test its action on copper, he was brought into the picture very late and had to depend on reports wihch he had no means of checking. He was given the invidious task of commenting on the findings of another chemist and asked to give conclusions that were in conflict. He carried out certain experiments, but he himself must realise that those experiments carried out in the ideal conditions of a laboratory where the temperature of the solution was not made to approximate that in the plant and the degree of aeration or the rate of flow and pressure were not reproduced, could not be conclusive."

Mr. Chelliah pinpointed certain passages in the evidence with the purpose of showing that these strictures were unjustified.

One such item is the experiment of Rintoul's subordinate in November 1970. She had been given a tarnished piece of copper and had placed it in a Brex solution for 24 hours. They were not told what concentration of Brex it was, and not having been asked, Rintoul did not determine the strength of hydrochloric acid in the solution. I.A.C., the manufacturers of the damaged air-conditioner had supplied them with both Brex, and the piece of copper, (no evidence if this formed part of the air-con. tubing). Pickling of the copper, *i.e.* the removal of sulphate or rust from it took place, and analysis of the solution showed that it contained small amount of copper. I would say that all this was quite inconclusive, and only showed what we already know *i.e.* Brex dissolves copper, despite claims that the inhibitor would prevent this. (Pages 179/180).

The later part of His Lordship's remarks about the inconclusive nature of Rintoul's experiments because these had been conducted under different conditions from those pertaining to the damaged plant, is, I would with respect say, amply supported by evidence both from that learned chemist himself as well as from other impeccable sources.

Rintoul had never denied that the rate of corrosion would be determined by the amount of oxygen in the water, which in this case was introduced by the aeration of water in the cooling process (see page 195). He also agreed (at page 191) that hydrochloric acid in oxygenated water could cause pitting of the copper pipes in 48 hours. At page 196 he admitted that he was not able to compare the rate of aeration in his experiments with the rate of aeration in Hotel Ambassador, because, having been briefed only 2 years after the event (in 1972), he had no opportunity to do so. He agreed (at page 197) that the higher the temperature of the copper tubes carrying water in the compressor unit, the higher would be the effect of corrosion by hydrochloric acid.

At page 198 he admitted that he had not tested the rates of corrosion by Brex at different temperatures, but had no reason to question PW2's analytical criteria in his tests. He then said that the rate of loss of copper is roughly doubled by a rise of 10°C, and at 70°C the rate is 11 times that at 30°C. With stirring, he added, the rate would be increased 3 times, with the qualifications (I believe he meant, depending on), (1) purity of the copper and (2) whether both sides of the metal is attacked. We know that the copper tubes were to all intents and purposes pure copper, but the qualification would mean that since only one side of the tubing is exposed to Brex, at a temperature of 70°C and with the water in circulation, the rate of corrosion could be 16½ times that shown in Rintoul's experiments.

I do not think one need have recourse to expert opinion to satisfy oneself, after a close examination of the copper tubing Exhibit D-6 that the furrows and pits, by their very nature, are not distributed evenly over the inner surface of the tubing, which itself is thinner on the outer side of the bends. I understand that this is because there is greater corrosion on rougher surface and at such bends.

Even if it is a question of dissolving evenly all the copper tubing ⅛" thick, which is the basis of Rintoul's calculations and not merely perforation of portions thereof, his figure of 1 or 2 months may have to be divided by 16½ giving 2 to 4 days. At the thinner bends subjected to greater turbulence, and given rougher surface, this latter period can, I envisage be of even shorter duration.

Having given detailed consideration to the various points raised on behalf of the appellants, and reinforced by the most lucid analysis of the learned trial judge, I would say that even if, as is highly probable, the plant had suffered from neglect due to insufficient maintenance, it was indeed Brex which had caused the corrosion and perforations which led to its breakdown.

Rintoul himself could not help agreeing when he remarked "that it would be extremely foolish to introduce a corrosive agent into a system where the metal is weakened. Acid is fairly dangerous unless diluted. I agree it would be necessary to ascertain the state of the metal before introducing acid and also to ascertain the state of the water. That is important. If I were the head of Scott and English, I would besides telling the salesmen not to exceed the dosage, instruct them to ascertain the state of the water as well as the state of the metal. I was astonished that this was not done." (Pages 210/211).

Proceeding to the next ground of appeal, did the trial judge misdirect himself in holding that the burden of proof was on the appellants?

In their particulars of negligence, plaintiffs had alleged that the second defendant/appellant had been negligent in —

(i) applying the said chemical (Brex) to the said air-conditioning plant without proper or adequate supervision when he knew or ought to have known that the said chemical had corrosive qualities; and

(ii) permitting the said chemical to remain in the cooling system of the said plant for too long a time which resulted in corrosion to the said plant.

The defendants/appellants in their Statement of Defence denied such negligence.

The fact that there were holes in the coils is part of the Agreed Facts. It was submitted that what is in dispute is what caused these perforations and not a case where the plaintiff can say that because the defendants poured Brex into the air-conditioner, then the appellants/defendants have to prove that they had not caused the perforations.

In other words the appellants are saying that the principle of *res ipsa loquitur* (pleaded in paragraph 7 of the Statement of Claim) in the alternative does not apply.

On behalf of the respondents/plaintiffs it was explained that this alternative plea was unavoidable because until the parties appeared in court, the appellants had not disclosed to them that Brex contained hydrochloric acid, which they had themselves to find by way of chemical analysis of the water samples.

It is abundantly clear that in setting out to prove negligence the respondents went beyond the onus of proof needed had they been relying on this principle exclusively.

In the context of what preceded the words "The onus is on the defendants" in his judgment, it is clear to me that the learned trial judge meant that having come to the conclusions set out in the four paragraphs preceeding, the onus had *shifted* to the defendants/appellants, which onus, he declared in paragraph 6, the appellants had failed to discharge, even on a balance of probabilities. I cannot see how anyone can take any exception to such a view of the burden of proof, and that the genesis of the ground of appeal is the removal of these words from the context in which they had been made.

That that was what his Lordship meant is best illustrated by setting out in full the preceding paragraphs I have alluded to, and I cite:—

"The evidence is sufficiently clear and to a certain extent uncontroverted for me to come to the following conclusions:

1. The Brex Concentrate was bought by the plaintiffs and sold by the 2nd defendant with the assurance of suitability and the promise of expert attention and supervision.
2. The Brex Concentrate was suitable for use on a recirculatory Water-system with copper pipings such as the air-conditioning plant of Hotel Ambassador, subject to certain precautions to be taken.
3. The precautions were not taken by the negligence of the defendants and their servants and agents and the Brex Concentrate was left over-long in the water-system.
4. The pipes were perforated as the result of the action of the hydrochloric acid on the copper pipes in the ideal conditions for corrosion of copper pipes obtained in a water-cooled recirculatory system."

Even if the respondents had not been able to pinpoint the very act or omission which had brought about the perforations to the coils which in turn had caused the complete breakdown of the air-conditioning system, the evidence adduced has, in my considered opinion been such as to entitle the respondents to rely on the principle of *res ipsa loquitur*.

A most lucid restatement of this principle was made by Megaw L.J. in *Lloyde* v. *West Midlands Gas Board*,[1] where his Lordship said:

"I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitute a failure to take proper care for the plaintiff's safety.

I have used the words 'evidence as it stands at the relevant time'. I think this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would, the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur*. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The res, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

Can it be said here that on a totality of the evidence, the res, which had spoken loud and clear at the close of the case for the plaintiff, had been silenced or in any way become muted. I fear the appellants/defendants had not succeded in doing so, and the plaintiffs must succeed.

In their last ground of appeal, the appellants contend that the court below had misdirected itself (i) in drawing an adverse inference from what Mr. Kirby is alleged to have said and (ii) in failing to draw an adverse inference from the failure of the respondents to produce Kellaway's report which they had in their possession.

The learned trial judge accepted as a fact that Kirby made the statement. The relevant passage in his judgment reads:—

"Kirby as the representative of Scott and English is, in my view, very much a party, or at least, a witness for the 1st defendant. No explanation was afforded for his absence from court, yet it must be seen that in the context of the question of how long it was safe to leave the chemical in the system, he should have been called to deny or explain the allegation of the plaintiffs' witnesses that at the meeting of the 2nd October, on hearing that the chemical had been left for 40 hours and more, he said that the time should not have exceeded 2 hours.

His remark was in accord with the instructions on the pamphlet D-13A. On the evidence led, I must come to the finding of fact that he did say this and that in his opinion, the opinion of a vendor as to the safe use of his product, the chemical should not have been left for more than 2 hours.

When one comes to compare his opinion with that of Johnny Kim, the most experienced of the three salesmen and the one still remaining with the firm, that 'according to my calculations, 1 part of Brex in 120 parts of water would be safe for copper for 48 hours', one can only conclude that either Kirby did not pass on the knowledge to his salesman or his salesman had been grossly forgetful."

There was no suggestion that the contents of this statement, as opposed to the fact that it was made, is inadmissible. That it is admissible for such purpose there can be no doubt. In *Sarkar* on Evidence, 12th Edition at page 191 appears the following passage:

"The declarations, admissions and acts of agents are admissible against their principals on grounds very similar to those which govern the declaration of co-partners. The principal constitutes the agent as his representative in the transaction of certain business. Whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal. The rule is one of substantive law and not evidence. It is founded on the legal identity of interest subsisting between the parties. They are original evidence and not hearsay; and being regarded as verbal acts they are receivable in evidence without calling the agent himself to prove them. [*Doe* v. *Hawkins* 1841, 2 QB 212]."

I would with respect say that this is a classical instance where a court may presume that anything else Mr. Kirby might have to say about how long Brex may be left in the system would be unfavourable to the appellants' case.

Should the trial judge have drawn an adverse inference from the fact that Kellaway's report was not produced?

At page 248 of his judgment, his Lordship remarked "In this connection, I refer to the application by counsel for the defendants for the production by the plaintiffs of the report of Kellaway of the I.A.C. It was learned counsel's contention that the time of his making the request when his own witness (DW4) was giving evidence was the right and proper moment. Production was objected to on the ground of privilege. Kellaway was not a party to the action and I had no evidence that he was an expert. I upheld the objection but there was an earlier report of Kellaway which was in the possession of the defence, and which being a near contemporaneous document was perhaps the more pertinent."

Kellaway made two reports. The first of these, a copy of which is in the possession of the appellants. It is the 2nd report, the non-production of which by respondents, counsel for appellants submits, justify the operation of the presumption under section 114(g) of the Evidence Act against them. In respect of this report, the respondents have filed an affidavit at the trial stating that it had been called into existence for the purpose of litigation, and was therefore privileged. That this report is privileged there can be no doubt. (See Phipson on Evidence — 10th Edition paragraph 604).

I am of the view that this appeal should be dismissed with costs.

Gill C.J. (Malaya) and **Ali F.J.** concurred.

Appeal dismissed.

Solicitors: *Skrine & Co.; Lim Kean Siew & Co.*

OOI AH PHUA v. OFFICER-IN-CHARGE CRIMINAL INVESTIGATION, KEDAH/PERLIS

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Wan Suleiman F.J.) June 2, 1975]

[Alor Star — Federal Court Civil Appeal No. 14 of 1975]

Administrative Law — Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested — Right to counsel — Whether denial renders detention unlawful — Criminal Procedure Code (F.M.S. Cap. 6), ss. 255, 365 — Federal Constitution, art. 5(3).

Constitutional Law — Fundamental liberty — Right to counsel — Federal Constitution, art. 5(3).

Habeas Corpus — Arrest by police — Refusal to allow solicitor to see person arrested.

This was an appeal from the decision of Hashim Yeop A. Sani J. (reported in [1975] 1 M.L.J. 93) dismissing an application for a writ of *habeas corpus*. The facts in this case were that the subject had been arrested by the police on December 26, 1974 and after being produced before the magistrate on December 28, 1974 he was formally charged on January 7, 1975 for abetment in armed robbery. The appellant, the father of the subject, instructed solicitors and counsel attempted to see the subject but was unsuccessful. Subsequently, the appellant applied for a writ of *habeas corpus* and it was alleged that (1) the right of the subject to consult and be defended by counsel of his choice commenced immediately after his arrest; (2) this right is an unqualified right and the denial of this right by the police had rendered the detention unlawful. The application having been dismissed in the High Court, the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the right of an arrested person to consult his lawyer begins from the moment of arrest but that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyers on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The right should not be exercised to the detriment of any investigation by the police;

(2) in any event *habeas corpus* was not the correct remedy in this case as the only complaint was that after the arrest of the subject, his solicitor was denied access to him.

Cases referred to:-

(1) *Moti Bai* v. *The State* A.I.R. 1954 Rajasthan 241.

(2) *Ramli bin Salleh* v. *Inspector Yahya bin Hashim* [1973] 1 M.L.J. 54.

(3) *Sundar Singh* v. *Emperor* A.I.R. 1930 Lahore 945.

(4) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137.

(5) *Re Madhu Limaye* A.I.R. 1969 S.C. 1014.

(6) *Public Prosecutor* v. *Mah Chuen Lim & Ors.* [1975] 1 M.L.J. 95.

FEDERAL COURT.

Karpal Singh for the appellant.

Lamin bin Haji Yunos (Federal Counsel) for the respondent.

Suffian L.P.: On December 26, 1974, at about 11.30 a.m. an armed robbery was committed by certain persons at the office of the Kubang Pasu Transport Co. at Jalan Tunku Ibrahim at Alor Star. Apparently the Police had advance information of the robbery and they were lying in ambush near the scene. Soon after the robbery had started they exchanged fire with the robbers, during which one of the robbers was shot dead and another injured and captured. Later the same day Inspector Amiruddin arrested Ooi Chooi Toh aged 25 on suspicion of having been the person who stood guard downstairs during the robbery. He was arrested about 50 yards from the scene of the crime.